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Tr Aling ak Anggau & Ors v Government of Sarawak & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–476–11 OF 2012
ABDUL WAHAB PATAIL, HAMID SULTAN AND VARGHESE GEORGE JJCA
17 APRIL 2014

Land Law — Customary land — Right to — Issuance of license — Claim of inherent occupation — Whether appellant had rights over the land claimed by them — Whether appellants had rights recognised by laws — Whether High Court did not make any inference but based its decision on findings of fact

The plaintiffs' ('the appellants') native customary right claim to the land ('NCR claim') arose from the issuance of license to the third respondent by the second respondent ('the licence') covering an area of 137,203 hectares. According to the appellants, starting from about the late 1800s, early 1900s and into the 1920s, their ancestors, together with many other Ibans migrated from the Skrang area in Sri Aman Division to Limbang Division. The respondents denied the appellants' claims and contended that the appellants had no NCR or any other rights whatsoever over the land claimed by them and that the appellants had no rights which were recognised by laws. The respondents contended that no extinguishment of the purported NCR over the land was required as there was no NCR lawfully created or acquired over the land or any part thereof as claimed by the appellants. In the present appeal, the appellants primary concern was only with the adjoining 2477 hectares under primary forest claimed by the appellants. The issue at hand was whether the High Court did not make any inference but based its decision on its findings of fact.

Held, dismissing the appeal:

(1) Though conclusions may have the appearance of a finding of facts, there were distinctions in considering the conclusion and decision of the High Court to determine if there is any error, defect, or irregularity, whether in the decision or otherwise had occurred and affecting the merits of the decision (see para 9).

(2) Clearly, that part of the land upon which NCR claim could be acquired were such parts that were occupied and cultivated. The proviso that where possible claims shall be registered, did not, notwithstanding the use of the word 'shall' make registration mandatory and failure to do so did not therefore render the claim null and void. However, the provision means NCR could no longer be acquired after the Land Order of 1920

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over land not cleared and cultivated as provided, even if it was land under the custom of Pulau Galau set aside and maintained under natural forest cover for the supply of forest produce (see para 15).

[Bahasa Malaysia summary

Tuntutan hak adat anak negeri kepada tanah plaintif-plaintif ('perayu-perayu') ('tuntutan HAAN') berbangkit daripada pengeluaran lesen kepada responden ketiga oleh responden kedua ('lesen') meliputi kawasan sebanyak 137,203 hektar. Mengikut perayu-perayu, bermula daripada kira-kira akhir 1800an, awal 1900an dan masuk kepada tahun 1920an, nenek moyang mereka bersama dengan orang Iban yang lain berhijrah dari kawasan Skrang di Bahagian Sri Aman ke Bahagian Limbang. Responden-responden menafikan tuntutan perayu-perayu dan berhujah bahawa perayu-perayu tidak mempunyai HAAN atau hak-hak lain ke atas tanah yang dituntut oleh mereka dan bahawa perayu-perayu tidak mempunyai hak yang diakui oleh undang-undang. Responden-responden berhujah bahawa tiada pelupusan HAAN ke atas tanah tersebut diperlukan memandangkan tidak terdapat HAAN yang dibentuk secara sah atau diambil alih ke atas tanah tersebut atau mana bahagiannya seperti yang dituntut oleh perayu-perayu. Dalam rayuan ini, perkara utama perayu-perayu hanya berkaitan dengan tanah 2477 hektar yang bersebelahan di bawah hutan utama yang dituntut oleh perayu-perayu. Isu utama adalah sama ada Mahkamah Tinggi tidak membuat apa-apa inferens tetapi berdasarkan keputusannya atas dapatan faktanya.

Diputuskan, menolak rayuan:

(1) Walaupun kesimpulan mempunyai dapatan fakta, terdapat perbezaan dalam mempertimbangkan kesimpulan dan keputusan Mahkamah Tinggi untuk menentukan jika terdapat apa-apa kesilapan, kecacatan, atau luar aturan, sama ada dalam keputusan atau sebaliknya telah berlaku dan menjejaskan merit keputusan (lihat perenggan 9).

(2) Jelas, bahagian tersebut tanah di mana tuntutan HAAN boleh diambil alih adalah bahagian yang dihuni atau diusahakan. Peruntukan bahawa di mana tuntutan kemungkinan boleh didaftarkan, tidak, walaupun penggunaan perkataan 'shall' membuat pendaftaran mandatori dan kegagalan berbuat sedemikian oleh itu menyebabkan tuntutan terbatal dan tak sah. Walau bagaimanapun, peruntukan bermaksud HAAN tidak lagi boleh diambil alih selepas *Land Order of 1920* ke atas tanah tidak dibersihkan dan diusahakan seperti yang diperuntukkan, walaupun jika tanah di bawah adat Pulau Galau diketepikan dan dikekalkan di bawah litupan hutan semula jadi untuk bekalan hasil hutan (lihat perenggan 15).]

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Notes

For cases on right to customary land, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3220–3222.

Cases referred to

APV Hill & Mills (M) Sdn Bhd v AQ Pacific Wide Sdn Bhd & Anor [2006] 3 MLJ 235, CA (refd)

Benmax v Austin Motors Co Ltd [1955] AC 370, HL (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 , FC (refd)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 1 MLJ 87, PC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 72

Evidence Act 1950 s 83(1)

Forests (Planted Forests Rules) 1997

Land (Classification) (Amendment) Ordinance 1954 8(3), (4)

Land Order 1920 s 22(i)

Sarawak Land Code (Cap 81) ss 5, s 10

Appeal from: Suit No 22–7 of 2007 (L6) (High Court, Limbang)

Baru Bian (Simon Siah SY Jen and Chua Kuan Ching with him) (Baru Bian & Co) for the appellants.

Saferi bin Ali (Azhar bin Bujang with him) (State Counsel and State Legal Officer, State Attorney General's Chambers) for the first respondent.

Leong Hsin Ru (Tang & Partners) for the second respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

BACKGROUND

[1] The appellants'/plaintiffs' native customary right claim to the land ('NCR claim') arose from the issue to the third respondent on 6 December 2004 the licence for planted forest No LPF/0038 ('the licence') covering an area of 137,203 hectares by the second respondent. It is not disputed that the appellants are Ibans and are natives of Sarawak.

[2] The High Court, in its decision delivered on the 20 September 2012, accepted that the appellants/plaintiffs had created and or acquired NCR rights

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over the land at Rh Aling, Pulau Brunei, Nanga Medamit, Limbang in respect of 1011 hectares only as against their NCR claim over a total of 3488 hectares.

[3] The appellants'/plaintiffs' appeal to this court is therefore concerned only with the adjoining 2477 hectares under primary forest claimed by the appellants.

[4] In its grounds of judgment, the High Court held:

> 46 In determining the size of the NCR land of the Plaintiffs, the court also takes into consideration that sub-sections (3) and (4) of section 8 of the Land (Classification) (Amendment) Ordinance, 1954 were amended and came into force on 16.4.1955. The amendments provided that it was illegal for any native to occupy any Interior Area Land by felling virgin jungle for the purpose of creating NCR upon such land without the prior permit from a District Officer. Again, it is not the plaintiffs' case and the plaintiffs did not testify that they had obtained such a permit. In any event they did not produce any such permit. Therefore the size or area of the NCR land claimed by the Plaintiffs should be based on the aerial photographs taken in 1948 and 1951.
>
> 47 Based on the evidence before the court, in particular exhibits D3, D20, D20A, D20B and P25, the court comes to a finding that the Plaintiffs have proved on a balance of probabilities that they have created, inherited and or acquired NCR over the land within the area of interest, that the NCR still subsist and that the size or area of their NCR land based on the aerial photographs taken in 1948 and 1951 amounted to 1011 hectares. ...

[5] The appellants' writ and statement of claim were dated 24 September 2007. They claimed that their ancestors, and now the appellants themselves and their families, have occupied, cultivated and used the land and continue to do so. The boundary, the descriptions and particulars of the NCR land which they claimed amounting to 3488 hectares were described in para 7 of the statement of claim and are delineated and shown in the maps marked as exhs P4 and P9.

APPELLATE INTERVENTION ON FINDINGS OF FACT

[6] The substantive submission for the respondents/defendants began with, citing *APV Hill & Mills (M) Sdn Bhd v AQ Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235 (CA). It was submitted that the High Court did not make any inference but based its decision on its findings of fact. The High Court had found as a fact, that the appellants had NCR totalling 1011 hectares only and not the whole of the area claimed. It was further submitted that the High Court had taken into consideration:

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(a) all evidences available before it, including the evidence of DW3, an expert who is in charge of the aerial photographs interpretation, whose evidence was unchallenged;

(b) the evidence of appellants' witnesses including P1,P4 and P9;

before finding that:

The community maps (P1, P4 and P9) were prepared by the plaintiffs based on their occupation of the land in 2002. They did not represent the status quo as at 1 January 1958. PW4 and the villagers who took part in the perimeter survey of their claimed NCR land were not qualified surveyors and had little experience to prepare the maps

[7] In *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 (FC) at p 505, the Federal Court held, citing *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (PC) that like the Privy Council, it adhered to the principle that a trial court is in a more advantageous position to make findings of facts and accessing the credibility of witnesses so that we will not interfere in a decision which is based on such findings of facts unless there is a clear justification on doing so. Even so, the Federal Court clearly recognised that it would more readily intervene with the trial judge's inference based on his findings as the Federal Court would be in an equally good position as the trial judge to make that determination. In this, the Federal Court referred to *Benmax v Austin Motors Co Ltd* [1955] AC 370 cited with approval in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87 and followed by the Federal Court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517. The Court of Appeal, in *APV Hill & Mills (M) Sdn Bhd v AQ Pacific Wide Sdn Bhd & Anor* [2006] 3 MLJ 235 (CA), held that it is settled law that the Court of Appeal could not be persuaded to come to its own conclusion on those facts which is different from the conclusion reached by the court of first instance unless the conclusion reached by the court of first instance is so unreasonable that no reasonable tribunal would have come to that conclusion. In our view, the careful language of the Federal Court of 'clear justification on doing so' than 'so unreasonable that no reasonable tribunal would have come to that conclusion' was to cover instances of failure of judicial appreciation of the facts and the evidence, which is not necessarily addressed by the words used in *APV Hill & Mills (M) Sdn Bhd*.

[8] It is in our view, necessary to bear in mind, the distinction between:

(a) a conclusion and decision, which is based upon an appreciation of the totality of facts and evidence as a whole, and

(b) findings of fact on specific disputed facts which are based upon credibility of witnesses for which purpose they are called to have their oral evidence examined and tested before the trial court to enable it to

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determine the testimony or version of which witness is more credible, therefore more reliable, safer to accept and to act upon as true and correct.

[9] Though conclusions may have the appearance of a finding of facts, we bear these distinctions in mind in considering the conclusion and decision of the High Court to determine if there is any error, defect, or irregularity, whether in the decision or otherwise had occurred and affecting the merits of the decision (see s 72 of the Courts of Judicature Act 1964 Act 91). We cautioned ourselves, as always, against the approach of dismissal of an appeal simply upon an attachment of the appellation 'a finding of fact'.

[10] The grounds of decision set out the basic dispute as follows:

> 4 According to the Plaintiffs, starting from about the late 1800s, early 1900s and into the 1920s, their ancestors, and later the third and 4th Plaintiffs, together with many other Ibans migrated from the Skrang area in Sri Aman Division to Limbang Division. They said that their migrations and that of their ancestors were approved by the Rajahs of Sarawak who facilitated their migrations and ensure their safe arrivals and settlements in Pulau Brunei ...
>
> 7 The Defendants denied the Plaintiffs' claims and contended that the Plaintiffs have no NCR or any other rights whatsoever over the land claimed by them and that the Plaintiffs have no rights which are recognized by laws immediately in force before 1.1.1958. The Defendants contended that no extinguishment of the purported NCR over the land was required as there was no NCR lawfully created or acquired over the land or any part thereof as claimed by the plaintiffs.
>
> 8 The Defendants also contended that the land covered by LPF/0038 issued to the 4th Defendant was not subject to the Plaintiffs' NCR. Even if the NCR have been lawfully acquired over the land, which they denied, they contended that the NCR would be excluded from the areas covered by the Licence. They contended that the Plaintiffs did not suffer any loss or damage as a result of the third Defendant granting the Licence to the 4th Defendant.

[11] The High Court addressed the disputed facts. We summarise evidence adduced for the appellants and the respondents herein as follows:

(a) For the appellants:

(i) PW1 (the third appellant/plaintiff) testified that he was born in 1918 and when he was about five years old, his family together with others migrated from their longhouse to Limbang in 1923. They were led by his father:

(ii) PW2 was born in 1944 at Pulau Brunei, Nanga Medamit, Limbang. He said that his parents migrated to Pulau Brunei, Nanga Medamit, Limbang, in the company of four communities led by

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four village headmen, and one of the survivors of the group who is still alive today is PW3 Jiram ak Pengiran (the fourth appellant/plaintiff). Exhibits P2, P3, P4, P5 and P6 were documents possessed by their village or longhouse executed by the respective Tuai Rumah of neighbouring longhouses, which was confirmed by the late Pengarah Ngang ak Bundan (later Dato' Temenggong Ngang ak Bundan) on 5 April 1973, defining the boundary of their longhouse and NCR land with the neighbouring longhouses and State land. In 2002, their village took the initiative to survey their pemakai menoa with the assistance of community surveyors. A draughtsman from Sahabat Alam Malaysia ('SAM') Encik Merin ak Rayong ('PW4') prepared a map of their NCR land which was tendered as exh P4;

(iii) PW3 (the fourth appellant/plaintiff) testified that he was also born in 1918 and migrated to Pulau Brunei, Nanga Medamit, Limbang with his adopted father about seven years after PW1 had migrated thereto;

(iv) PW4 testified he worked as a draughtsman and surveyor with the Borneo Resources Institute ('BRIMAS') which assisted the natives with problems relating to their NCR land and that TR Aling ak Anggau ('PW5') requested the assistance of Shahabat Alam Malaysia ('SAM') and BRIMAS to carry out a perimeter survey of their NCR land. He said he trained a number of villagers, including Harrison Jugah ak Nyawai ('PW9') to assist in the survey carried out from 29 August 2002 to 5 September 2002, and from the GPS data prepared the map exh P4 and another map showing the land use of the appellants'/plaintiffs' land (exh PI); and

(v) PW5 (the first appellant/plaintiff) testified that he was born in 1939 at Pulau Brunei, Nanga Medamit, Limbang. He said that the history of their settlement, according to the oral accounts of village elders, began in the early 1910s. He had heard these elders recounted their history to the younger villagers including himself. He said that although many have already died, two of the last remaining elders still alive today are Chupong ak Baraw (third appellant/plaintiff) and Jiram ak Pengiran (fourth appellant/plaintiff). He testified that in August, 2005, they were given a shock when someone carried out survey works on their temuda land and their rubber gardens in the upper part of Sg Entrol, within their NCR land. He said that on 18 March 2006 they were again taken by surprise when bulldozers came onto their temuda land and started to bulldoze their land even though there was still padi in the land. One of the land owners whose land was bulldozed was the second appellant/plaintiff Ana ak Batang

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('PW7'). There was further entry on 28 March 2007, as a result of which on 9 April 2007, a police report (exh P24) was lodged by one of the villagers, Anjah ak Nau ('PW11'). A

(b) For the respondents:

(i) DW1 the Superintendent of the Lands and Surveys Department, Limbang said: B

(1) the area claimed by the appellants was issued with a Licence for Planted Forest LPF/0038 to the third respondent;

(2) from their records there was no land title issued over the area; C

(3) previously, a timber licence was issued covering parts of the area to Limbang Trading (Limbang) Sdn Bhd under timber licence T/0129;

(4) no permit was issued to the local natives ie the appellants/plaintiffs to create NCR over the area; and D

(5) the NCR claim by the first and second appellants was not recognised by their department.

(ii) DW2, a *Pemelihara Hutan* with the Sarawak Forests Department, said: E

(1) PF/0038 was issued pursuant to the Forests (Planted Forests Rules) 1997; and

(2) the areas covered by LPF/0038 were previously logged over under forest timber licence T/0129 issued to Limbang Trading (Limbang) Sdn Bhd and that there was no objection from the local natives when T/0129 and or when LPF/0038 were issued. F

(The High Court observed he did not testify whether the local natives or the appellants/plaintiffs were informed of the intended issues of the licences or knew when the licences were to be issued or were consulted before the licences were issued.) G

(iii) DW3, a *Pembantu Teknik Ukur* J29 with the Lands 85 Surveys Department Headquarters, Sarawak, testified: H

(1) on 31 November 2009, he was instructed to prepare a map of the area claimed by the appellants/plaintiffs, in particular over parts of LPF/0038 by reference to aerial photographs kept in the department. He was also instructed to prepare four 'aerial photograph maps' namely, one map to show the area claimed by the appellants/plaintiffs before the year 1958, one map after 1958, a topographical map and a map showing the area of interest inside LPF/0038. He also prepared a report (exh D3) on how the aerial photographs were interpreted and how the aerial photograph maps which showed the area claimed by the appellants/plaintiffs were prepared; I

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(2) since the map exh D3 was only in respect of the NCR land claimed by the appellants/plaintiffs situated within LPF/0038, and did not show the whole NCR land claimed by the appellants/plaintiffs, he subsequently prepared another report and set of maps to show the whole NCR land claimed by the appellants/plaintiffs which he referred to as the area of interest. These were marked as exhs D20, D20A, D20B and D20C;

(3) he prepared the map D20A for the area of interest for pre-1958 based on aerial photographs taken in 1948 and 1951 and the map D20B for the area post-1958 based on aerial photographs taken in 1965; and

(4) based on the aerial photographs taken in 1948 and 1951, the cleared area within the 19 area of interest amounted to 1011 hectares, and it had increased to 1479 hectares based on the aerial photographs taken in 1965.

[12] The High Court then reasoned as follows as to the evidence as to area occupied:

(a) were prepared by the appellants/plaintiffs based on their occupation of the land in 2002 and did not represent the status quo as at 1 January 1958.

(i) were prepared by the appellants/plaintiffs based on their occupation of the land in 2002 and did not represent the status quo as at 1 January 1958;

(ii) PW4 and the villagers who took part in the perimeter survey of their claimed NCR land were not qualified surveyors and had little experience to prepare the maps;

(iii) DW4 and DW5 were not qualified surveyors and the maps D5 and D6 prepared by them were also not accurate;

(iv) DW3 who had a certificate in Lands and Surveys in 1998, a certificate in hydrography in 2003 and a diploma in land and survey in 2005, and having worked as an assistant surveyor and surveyor assistant both in the private and public sectors, was more qualified than PW4 and the villagers and DW4 and DW5 in carrying out any survey, preparation of the maps and in the interpretation of the aerial photographs;

(v) s 83(1) of the Evidence Act 1950 provides that the court shall presume that maps or plans purporting to be made by the authority of the Government of Malaysia or the government of any state were so made and are accurate.

(b) as to area occupied:

(i) based on the aerial photographs taken in 1948 and 1951, exhs

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D20A and D20B showed that claimed by the appellants/plaintiffs had been cleared for farming at the times;

(ii) there was no aerial photograph were taken on 31 December 1957 or on 1 January 1958 and produced as exhibit to show how many hectares had been cleared between 1951 and 1 January 1958 within the area claimed by the appellants/plaintiffs.

(iii) aerial photographs taken in 1965 showed that the claimed area had increased in size from 1011 hectares to 1475 hectares;

(iv) there was no specific evidence whether the additional acreages were cleared prior to 1958 or subsequent to 1 January 1958 until 1965;

(v) it is not the appellants/plaintiffs' case and the appellants/plaintiffs did not produce any permit from the Superintendent of Lands and Surveys under s 5 and s 10 of the Land Code to create and acquire NCR within the area of interest from 1 January 1958;

(vi) the court also takes into consideration that sub-ss (3) and (4) of s 8 of the Land (Classification) (Amendment) Ordinance, 1954 were amended and came into force on 16 April 1955, that it was illegal for any native to occupy any Interior Area Land by felling virgin jungle for the purpose of creating NCR upon such land without the prior permit from a district officer.

[13] Based upon these, the High Court made the following findings:

(a) in particular exhs D3, D20, D20A, D20B and P25, the court comes to a finding that the appellants /plaintiffs have proved on a balance of probabilities that they have created, inherited and or acquired NCR over the land within the area of interest, that the NCR still subsist and that the size or area of their NCR land based on the aerial photographs taken in 1948 and 1951 amounted to 1011 hectares;

(b) since cl 22(1) of the licence of LPF/0038 specifically states that nothing in the licence shall be deemed to affect the rights which any native has, prior to the issue of the licence, lawfully acquired over the said land under the Land Code or the Ordinance, that it shall be the duty of the licensee at his own costs and expenses to comply with the provisions of the Rules relating to the establishment of planted forest over lands subject to native customary rights claim, the High Court concluded LPF/0038 did not and does not extinguish, derogate from or affect any NCR which have been lawfully created and or acquired over land situated within the licence;

(c) the evidence showed that the appellants/plaintiffs have been residing and continue to reside at their longhouse at Pulau Brunei, Nanga

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Medamit and have claimed the area around their longhouse as their NCR land. The evidence showed that they did not and have not abandoned their NCR land;

(d) the third respondent/fourth defendant was not the licensee and is a licensee under timber licenses T/0129 and T/0222 and is not in a position to take advantage of the two timber licenses and to claim adverse possession against the appellants/plaintiffs under T/0129 and T/0222;

(e) LPF/0038 is not a document of title to the land, but merely a licence issued by the Forests Department, and there being no evidence that the third respondent/4th defendant is the registered owner of the land, the question of indefeasibility of title does not arise and there is no merit on this ground; and

(f) given cl 22 of the licence, the High Court concluded the first respondent/second defendant and second respondent/third defendant in issuing LPF/0038 to the third respondent/fourth defendant did not have any intention to diminish, impair or extinguish any NCR which the appellants/plaintiffs or any other natives may have over the land situated within the licensed areas.

CONCLUSION AND DECISION

[14] Having found that the appellants' ancestors had come and settled on the land in the 1920s, the relevant law to be applied is the Land Order of 1920, s 22(i) of which provided:

> Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all Native Headman and also in the Land Office in each district.

[15] Clearly, that part of the land upon which NCR claim could be acquired are such parts that are occupied and cultivated. The proviso that where possible claims shall be registered, does not, notwithstanding the use of the word 'shall' make registration mandatory and failure to do so does not therefore render the claim null and void. However, the provision means NCR could no longer be acquired after the Land Order of 1920 over land not cleared and cultivated as provided, even if it is land under the custom of 'pulau galau' set aside and maintained under natural forest cover for the supply of forest produce.

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[16] Accordingly, we dismiss the appeal, affirm the decision of the High Court and fix costs to be paid by the appellants, unless otherwise agreed, at RM5,000 to the first, second and fourth respondents and RM5,000 to the third respondent.

Appeal dismissed.

Reported by Afiq Mohamad Noor